ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

NO. _____

WILBERT K ROGERS,

Petitioner,

VS.

STATE OF TENNESSEE,

Respondent.

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SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, WILBERT K. ROGERS, being first duly sworn, depose and say that I am the petitioner in the above-styled case; that in support of my Motion to proceed on a Petition for Writ of Certiorari without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the cost of my prosecuting the Petition for Writ of Certiorari are true.

1. I am presently unemployed and incarcerated in the Tennessee Penitentiary system at Henning, Tennessee.

2. I have received no income within the past twelve months from a business, profession or other form of self-employment or from rent payments, interest dividends, or from any other source.

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SUPREME COURT, U.S.

21PP

3. I own no cash or checking or savings account.

4. I own no real estate, stocks, bonds, notes, automobiles or other valuable property.

5. I have 0 dependents.

I understand that a false statement in this Affidavit will subject me to penalties for perjury.

Wilbert K. Rogers Wilbert K. Rogers

SWORN TO AND SUBSCRIBED BEFORE me this 23 day of July, 1999.

Elsie Ann Cooper
Notary Public

My Commission Expires:

June 16, 2003

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

ATTORNEY FOR PETITIONER:

W. Mark Ward
Assistant Shelby County Public Defender
Suite 2-01, 201 Poplar Ave.
Memphis, TN 38103
Telephone: (901) 545-5837

99-6218

QUESTION PRESENTED FOR REVIEW

ROGERS v. TENNESSEE

Whether the ex post facto application of a judicial ruling abrogating the substantive rule of criminal law known as the "year-and-a-day rule" to a homicide committed five years prior to the change in the substantive rule of law violates the Fifth and Fourteenth Amendments of the U. S. Constitution?

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INTRODUCTION

The petitioner, Wilbert K. Rogers, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Tennessee, affirming his conviction for second degree murder and sentence of 33 years imprisonment.

OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999).

JURISDICTION

The opinion of the Supreme Court of Tennessee was entered on May 24, 1999. The Supreme Court of Tennessee denied a Petition to Rehear on June 21, 1999. Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner submits that this case involves application of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A. Procedural History

In September 1995, the Petitioner, Wilbert K. Rogers, was indicted by the Shelby County (Memphis, Tennessee) Grand Jury for Murder in the First Degree, allegedly committed against James Bowdery on May 7, 1994. (I, 1-13). Mr. Bowdery died on August 29, 1995, more than a year-and-a-day after the assault. (II, 138-139, 142). The Shelby County Public Defender was appointed to represent the Petitioner and on January 31, 1996, a petit jury found the Petitioner guilty of second degree murder. He was sentenced to 33 years imprisonment. (I, 34).

On appeal to the Tennessee Court of Criminal Appeals, Petitioner raised the issue that he could not be convicted of murder because of the common law year-and-a-day rule which had been declared to be the law in Tennessee by both the Tennessee Supreme

Court[1] and the Tennessee Court of Criminal Appeals.[2] On October 17, 1997, the Tennessee Court of Criminal Appeals rejected the Petitioner's appeal and found that the year-and-a-day rule had been abolished by its failure to include it in Tennessee's codification of its criminal laws in 1989. As authority, the Court of Criminal Appeals cited another opinion[3] of the Court of Criminal Appeals which *significantly* had been decided after the Petitioner's assault of the victim in the present case.

The Tennessee Supreme Court granted Mr. Rogers' Application for Permission to Appeal and on May 24, 1999 issued its opinion in *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The Tennessee Supreme Court concluded that the year-and-a-day rule had *not* been abolished by the 1989 Tennessee Criminal Code and that it was in full force and affect in Tennessee at the time that the Petitioner assaulted the victim in the present case. The Tennessee Supreme Court further found that the common law year-and-a-day rule was no longer justified and it abrogated the rule.

The Tennessee Supreme Court further concluded that its judicial abrogation of the rule in 1999 could be applied to the assault in the present case which occurred in 1994 without violating the Fifth and Fourteenth Amendments of the United States Constitution because the retroactive application was not unexpected. See *State v. Rogers*, 992 S.W.2d

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[1]Percer v. State, 118 Tenn. 765, 777, 103 S.W. 780, 782 (1907).

[2]Cole v. State, 512 S.W.2d 598, 601 (Tenn. Crim. App. 1974).

[3]State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995). This case was decided after Mr. Rogers assaulted the victim in the present case and could in no way provide any type of notice to Petitioner that the year-and-a-day rule in Tennessee may have been abolished.

393, 402 (Tenn. 1999).

On June 21, 1999, the Tennessee Supreme Court denied a Petition to Rehear.

B. Statement of Facts

This case involves purely a question of law. There was no factual dispute as to the fact that the victim died more than a year-and-day after the assault.

REASONS FOR GRANTING THE PETITION

The Tennessee Supreme Court's opinion cites two United States Supreme Court opinions for the rule of law that the Fifth and Fourteenth Amendments only prohibit retroactive application of judicial constructions of a criminal statute that are "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *State v. Rogers*, 992 S.W.2d 402 (Tenn. 1999). The two cases relied upon are *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) and *Marks v. United States*, 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-93, 51 L.Ed.2d 260 (1977). The Tennessee Supreme Court then concludes that "[g]iven the fact that the rule has been abolished by every court [referring to other states] which has squarely faced the issue, and given the fact that the validity of the rule has been questioned in this State in light of the passage of the 1989 Act, we conclude that our decision abrogating the rule is not an unexpected and unforeseen judicial construction of a principle of criminal law." *State v. Rogers*, at 402.

Petitioner respectfully submits that the Tennessee Supreme Court overlooked or misapprehended the import of both *Bouie* and *Marks* by finding that it could look to the law of other jurisdictions to determine whether its abrogation of the year-and-a-day rule was "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue."

In *Bouie v. City of Columbia* the defendants' trespass convictions were affirmed by the South Carolina Supreme Court based on the retroactive application of an interpretation of a trespass statute to include the act of *remaining* on premises after receiving notice to

leave. The specific statute in question made it a criminal offense to *enter* upon the premises of another after having received notice from the owner prohibiting the entry. Quoting from Hall, General Principles of Criminal Law (2d ed 1960, at 61, the United States Supreme Court stated that "i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie* at 378 U.S. 354. In determining whether the state court's construction of the criminal statute was so unforeseeable as to deprive the defendant of fair warning, the United States Supreme Court focused primarily upon two areas of inquiry. First, if the result of the judicial interpretation (abrogation of the year-and-a-day rule) had been accomplished by an amendment to the statute by the legislature, would the retroactive application of the amendment violate the constitution. In *Bouie* the U. S. Supreme Court concluded that had the change in the law been accomplished by the legislature, clearly there would have been an ex post facto violation in applying the change retroactively. *Bouie* at 378 U.S. 354-355. Similarly, had the Tennessee legislature at its 1999 session amended the 1989 Criminal Code to do away with the year-and-a-day rule, the amendment could not have been retroactively applied to offenses committed before the effective date of the amendment. The second primary area of inquiry by the U.S. Supreme Court was the prior decisional law of South Carolina. Looking at prior South Carolina decisional law, the U.S. Supreme Court concluded that the new interpretation of the statute to include remaining on premises "has not the slightest support in prior South Carolina decisions." *Bouie* at 378 U.S. 356. Accordingly, the U.S. Supreme Court concluded that the pre-existing South Carolina law gave the defendants

no warning of the judicial construction of the statute.

With regard to whether the law of other states could be consulted the United States Supreme Court said "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Bouie* at 378 U.S. 359-360. However, the United States Supreme Court did go on and conclude that "if the law of other States is indeed to be consulted" that law also does not support the judicial construction applied by South Carolina. *Bouie* at 378 U.S. 360.

In *Marks v. United States* the defendants were convicted in federal court of transporting obscene materials based on retroactive application of the definition of obscenity announced in *Miller v. California*, 413 U.S. 15 (1973). The United States Supreme Court reversed the convictions holding that the due process clause forbid the retroactive application of the *Miller* standards. *Marks v. United States* has no similarities to the present case other than to restate the general rule of *Bouie*.

Petitioner can find no United States Supreme Court opinion that has applied the *Bouie* test and found the retroactive application of a new judicial construction to be constitutional. Furthermore, the *Bouie* test focuses on the prior judicial decisions of the state of defendant's offense, not other states. Petitioner respectfully submits that there is no duty placed upon the citizens of Tennessee to know the laws of all fifty states in the union. Likewise, changes in the laws of other states cannot be the foundation for giving Tennessee citizens "fair warning" as to the substance of Tennessee law.

Focusing on the prior decisional law in Tennessee, the year-and-a-day rule was

clearly recognized as the law in Tennessee in *Percer v. State*, 118 Tenn. 765, 103 S.W. 780 (1907) and *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974). At the time Petitioner committed his actions in the present case, no Tennessee decisional law had ever called the year-and-a-day rule in question. As such, based on Tennessee law as it "had been expressed prior to the conduct in issue" there is not the slightest support for abrogation of the year-and-a-day rule and no "fair warning" to the Petitioner. Contrary to the Tennessee Supreme Court's conclusion the validity of the year-and-a-day rule in Tennessee was never questioned until after Petitioner's acts in the present case.

The Tennessee Supreme Court also cited authorities from three other states as supporting the decision to apply the abrogation of the year-and-a-day rule retroactively. *People v. Snipe*, 192 Cal. Rptr. 6 (Ca. Ct. App. 1972); *Commonwealth v. Ladd*, 166 A.2d 501 (Pa. 1960), and *State v. Sandridge*, 365 N.E.2d 898 (Ohio Ct. C.P. 1977). Petitioner respectfully submits that these three authorities pale in comparison to those which have found such retroactive application to violate ex post facto concerns. The Tennessee Supreme Court cited six state supreme court opinions and a federal court opinion finding a violation of ex post facto rules. See *State v. Rogers*, 992 S.W.2d 393, 402 (Tenn. 1999). In addition to those seven authorities, *State v. Cross*, 260 Ga. 845, 401 S.E.2d 510 (1991); and *State v. Edwards*, 104 Wash.2d 63, 701 P.2d 508 (1985)(statute creating three-years-and-a-day rule cannot be applied retroactively) also support the ex post facto contentions of the Petitioner. Furthermore, Petitioner relies not only upon the sheer number of authorities in support of his contention but also on the fact that the three authorities relied upon by the Tennessee Supreme Court may be distinguished from the present case.

Snipe and *Ladd* both involve jurisdictions where the year-and-a-day rule was considered nothing more than a rule of evidence, not a substantive rule of law. The State concedes in the present case that the rule in Tennessee concerned a substantive rule of law. In addition, in *Snipe* the legislature changed the year-and-a-day rule before the year had expired. The Court placed great weight on the fact that the change in the law had occurred before the right to the rule had vested. Finally, *Sandridge* is nothing more than a trial court opinion in which ex post facto was never considered or mentioned in any fashion.

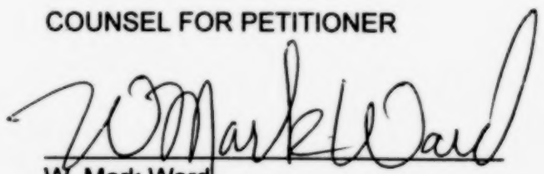
Based on the foregoing authorities, it is clear that there is a conflict among the states as to whether the abrogation of the year-and-a-day rule may be applied retroactively. In addition to resolving this conflict, the present Petition raises important questions of law. The exception allowing retroactivity that was created in *Bouie v. City of Columbia* has never been applied to allow retroactive application of a new judicial construction. In addition, the question of whether the rule allows the law of other states to provide notice to a defendant has never been addressed by the United States Supreme court, but only alluded to in *Bouie*. Finally, this Honorable Court has granted a Writ of Certiorari in *Carmell v. State*, 963 S.W.2d 833 (Tex. App. - Fort Worth 1998) to resolve the retroactivity of a procedural statute. The present case involves the retroactivity of a judicial construction of a substantive rule of law. Application of the new substantive rule of law to an offense committed five years earlier is more egregious than the application of the new procedural rule in *Carmell*.

CONCLUSION

Petitioner respectfully asks this most Honorable Supreme Court of the United States to grant his Petition for Writ of Certiorari to the Supreme Court of Tennessee. Questions of constitutional law are presented in this Petition which are of paramount interest and importance.

Respectfully submitted,

COUNSEL FOR PETITIONER



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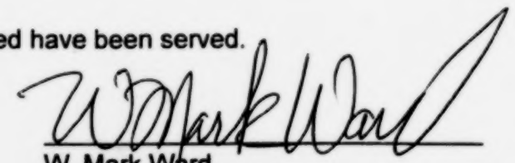
CERTIFICATE OF SERVICE

I, W. Mark Ward, a member of the Bar of the Supreme Court of the United States and counsel of record for Wilbert K. Rogers, petitioner herein, hereby certifies that on the 3rd day of August, 1999, I served a copy of the foregoing Petition for Writ of Certiorari in the above entitled case on the Attorney General of Tennessee, by depositing the same in the United States Post Office, Memphis, Tennessee, with first-class postage prepaid, properly addressed to said respondent's counsel at the Criminal Justice Division, Cordell Hull Building, 2nd Floor, 425 5th Avenue North, Nashville, Tennessee 37243-0493, his post office address.

All parties required to be served have been served.



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4 TFRM 2000
(Rev. 5-84)
1166-226

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VOUCHER AND SCHEDULE OF PAYMENTS

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BUREAU OR OFFICE: Clerk's Office
LOCATION OF TRANSMITTING OFFICE: Washington, D.C.

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DATE

Dee Shore
AUTHORIZED CERTIFYING OFFICER

APPROPRIATION SUMMARY

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ALIGN AREA

ALIGN AREA					
FONT	SHEET	OF	AGENCY STATION NO	SCHEDULE NUMBER	FOR D O USE ONLY
1	1	1	5698		

GRAND TOTAL	NO-CHECK TOTAL
$4,921.55	

MEMORANDUM

PAYEE AND IF NECESSARY, ADDRESS (LINES 1, 3, 5, AND 7)	INVOICE NUMBER (LINES 2, 4, 6 AND 8)		AMOUNT	NO CHECK	VOUCHER NO
Wilson Epes Printing Co. 707 Sixth Street, N.W. Washington, D.C. 20001	99-6218	(14638)	$ 963.00		C-52
Cockle Printing Co. 2311 Douglas Street Omaha, NE 68102	99-6218	(20724)			
	99-7504	(20687)	$ 3,958.55		C-53
	99-7504	(20686)			

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	99-7504	(20687)	$ 3,958.55		C-53
	99-7504	(20686)			

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Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

August 7, 2000

Paul G. Summers, Esq.
425 Fifth Ave., North
Nashville, TN 37243

Re: 99-6218 - Rogers v. Tennessee

Dear Mr. Summers:

The above stated case is scheduled for oral argument on **Wednesday, November 1, 2000**. Arguing counsel must be present on that day.

Arguing counsel must report to the Lawyer's Lounge on the first floor between 9:00 and 9:15 a.m. on the day assigned for argument. The Clerk will brief counsel scheduled to argue. Identification cards will be issued to those attorneys authorized to occupy seats at argument tables.

A copy of the argument schedule for the Session Beginning October 30, 2000 is enclosed. Please read carefully the instructions to counsel printed on the reverse side of the calendar.

Also, enclosed is an Argument Form. Please complete this form and return it to me no later than **Monday, September 11, 2000.** If you have any questions, please do not hesitate to get in touch with me.

Sincerely,

Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

August 7, 2000

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

Clerk
Supreme Court of Tennessee,
Western Division
100 Supreme Court Building
Nashville, TN 37219-0606

Re: 99-6218 - Rogers v. Tennessee
(Your Docket No. 02S019804CR00035)

Dear Clerk:

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, you are requested to certify and transmit immediately the entire record in the above case to this office. Please include in this transmittal all exhibits, lodgings, and briefs that have been filed.

Please be certain to include a transmittal letter referencing this Court's docket number. It is critical that you note if the record, or any portion of the record, has been sealed or contains confidential information. If this type of information is contained in the record, these documents must be enclosed in a separate envelope or box and marked accordingly.

If your court is not in possession of the lower court record, please forward a copy of this letter and a request for the lower court to transmit its record directly to this office.

If you have any questions please contact me. Your prompt attention to this matter will be greatly appreciated.

Kindly acknowledge receipt of this letter.

Sincerely,

WILLIAM K. SUTER, CLERK

Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

cc: Mark Ward, Esq.
Paul G. Summers, Esq.